(2)

No. 93-1133

FILED
FEB 11 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,

Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Judicial Court
Of The State Of Maine**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH A. DYER, ESQUIRE
LAW OFFICES OF RALPH A. DYER
477 Congress Street
Portland, Maine 04101
(207) 773-6489

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE PRESENTED BY THE PETITION 1

STATEMENT OF THE CASE 1

A. Background 1

B. Proceedings Below 3

REASONS FOR DENYING THE PETITION OF CERTIORARI 4

ARGUMENT 5

1. The Petitioners' Request For A Writ Of Certiorari Is Premature 5

2. The Ordinance Is Discriminatory On Its Face And Is Subject To Review In The Trial Court By A "Strict Scrutiny" Standard 6

3. Petitioners Did Not Raise The Issue Of Federal Delegation In The Maine Courts 8

4. RCRA Does Not Restrict The Application Of The Dormant Commerce Clause To Validate Hoarding Of Commodities 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Cadinale v. Louisiana, 394 U.S. 437 (1969) 9

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 5

DeVito v. Rhode Island Solid Waste Management Corporation, 770 F.Supp. 775 (D.R.I. 1991) 9

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S.Ct. 2019 (1992) 6, 7

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) 6, 8

Hodel v. Virginia Surface Mining and Reclamation Ass'n. Inc., 452 U.S. 264 (1981) 6

O'Dell v. Espinoza, 456 U.S. 430 (1982) 5

Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992) 10

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 6

Town of Clarkstown v. C&A Carbone, Inc., 587 N.Y.S.2d 681 (1992), cert. granted, 126 L.Ed.2d 369, 62 U.S.L.W. 3334.....6, 10

Tri-State Rubbish, Inc. v. Town of Gray, 632 A.2d 134 (Me. 1993) 4

OTHER AUTHORITIES

28 United States Code Annotated § 1257 (West 1993).....5, 8

TABLE OF AUTHORITIES – Continued

Page

38 Maine Revised Statutes Annotated § 1304-B (West 1989) 2

38 Maine Revised Statutes Annotated § 2101 (West Supp. 1993) 7

42 United States Code Annotated § 6901, et seq. 5, 8

United States Constitution, Art. I, sec. 8, cl. 3 1

Wright, Miller, Cooper & Greshman, Federal Practice & Procedure, Civil § 4009 at 589-590 (2 Ed. 1990 and Supp. 1993) 6

STATEMENT OF THE ISSUE PRESENTED BY THE PETITION

WHETHER THE SOLID WASTE FLOW CONTROL ORDINANCE ADOPTED BY THE TOWN OF GRAY, MAINE, IS EXEMPT FROM THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

Tri-State Rubbish, Inc. ("Tri-State") is a hauler of commercial and residential waste. Tri-State operates in the State of Maine. Tri-State commenced this action in the Superior Court of the State of Maine seeking, *inter alia*, a declaration that the Solid Waste Flow Control and Recycling Ordinance (the "Ordinance") adopted by the Town of Gray, State of Maine, violates the dormant Commerce Clause (United States Constitution, Art. I, sec. 8, cl. 3). A copy of the Ordinance is included as Appendix E to the Petition for a Writ of Certiorari (Pet. App. 47a, et seq.) submitted by the Petitioners Town of Gray and Regional Waste Systems, Inc. ("RWS").

A. Background

RWS is a non-capital stock, non-profit corporation formed by Gray and 19 other municipalities to construct and operate a waste to energy plant for the disposal of solid waste generated in the member municipalities. The construction of the RWS facility was financed primarily by the issuance of bonds totalling $105 million. See, Pet. 8. The financing was predicated upon the requirement

that each member municipality adopt a flow control ordinance assuring delivery of all solid waste generated in their respective municipality to be used as fuel to operate the waste to energy plant. See, Pet. 8, 27.

Each of the member municipalities contracted with RWS for solid waste disposal services by executing and delivering a Waste Handling Agreement. See, Pet. 8-9. The Waste Handling Agreements require Gray and each other member municipality to adopt solid waste flow control ordinances mandating delivery of all "acceptable waste" generated in the respective municipality to RWS or, with certain exceptions, pay a penalty equal to 125% of the tipping fee for each ton of "acceptable waste" which is diverted elsewhere for any reason.

Maine municipalities are authorized by the State to adopt solid waste flow control ordinances "when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes." See, 38 M.R.S.A. § 1304-B(2) (West 1989). The legislation is intended to promote the financing of disposal facilities by guaranteeing a steady supply of solid waste to such facilities. See, 38 M.R.S.A. § 1304-B(1) (West 1989).

Appendix E to the Petition is a copy of the present version of the flow control ordinance duly adopted by Gray pursuant to the Waste Handling Agreement and the enabling statute. Section III-C provides that all solid waste generated in Gray is the property of the Town. Section VII-D of the Ordinance requires that Tri-State, and all other waste haulers operating in Gray, only deliver solid waste generated in Gray to RWS for disposal

at a cost to the hauler of $51 per ton. The Ordinance requires that all segregated, recyclable waste generated by a commercial establishment may be delivered by the generator to the Gray Transfer Station without charge to the generator. See, Ordinance, Section IV-B. Commercial haulers are denied access to the Transfer Station and no provision is made in the Ordinance for the delivery of recyclable waste to any facility other than the waste to energy incinerator. See, Ordinance Sections VII-D, H.

It is Tri-State's position that solid waste is a valuable commodity regularly traded in interstate commerce as fuel for waste to energy plants and/or for recovery of reusable, recyclable materials. The Ordinance prohibits commercial haulers from collecting, processing or otherwise putting solid waste into commerce. The Petitioners have ordered an embargo of all solid waste generated in Gray. The commodities are quarantined or restrained from interstate trade for the exclusive economic benefit of Gray and RWS.

B. Proceedings Below

The proceedings in the State Courts are described accurately by Petitioners. The Supreme Court of the State of Maine, sitting as the Law Court, has considered on appeal by Tri-State the decision of the Superior Court granting summary judgment in favor of Gray and RWS. The Supreme Court reversed the decision of the Superior Court finding that the Ordinance has a discriminatory effect on interstate commerce and remanded the case to the Superior Court for further proceedings in which it will be the burden of Gray and RWS to "show valid

reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives to the Ordinance are unavailable". See, *Tri-State Rubbish, Inc. v. Town of Gray*, 632 A.2d 134, 136-137 (Me. 1993).

REASONS FOR DENYING THE PETITION OF CERTIORARI

1. The Petition for a Writ of Certiorari is premature. The Maine Supreme Court remanded the case for hearing on the question whether there are legitimate grounds for interference with interstate commerce. The evidence to be presented may be determinative of the issue and render moot the request for this Court's review of the constitutional issues.

2. The Maine Supreme Court found correctly that the Ordinance is an impermissible interference with interstate commerce because it seeks to reserve a valuable commodity from trade for the exclusive use of RWS. The Ordinance insulates RWS from competition with businesses using other waste disposal alternatives, including, without limitation, the reuse and recycling of materials which would otherwise be incinerated by RWS. Until the Town of Gray can demonstrate that the Ordinance was not adopted for economic protectionism and that there are no reasonable alternatives for the disposal of waste, there is no final judgment.

3. The Petitioners' argument that principals of federalism exempt the Town of Gray from the application of the dormant Commerce Clause was not advanced below and may not be raised at this juncture.

4. The directions contained in the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. § 6901, et seq., for local control of waste disposal by environmentally sound methods do not authorize local government interference with interstate commerce. A federal statute promulgated pursuant to the Commerce Clause does not create an exemption by implication from constitutional restraints.

ARGUMENT

1. The Petitioners' Request For A Writ Of Certiorari Is Premature.

The Maine Supreme Court remanded this case to the trial court for specific findings directly relevant to the constitutionality of the Ordinance. The decision of the Maine Supreme Court does not constitute a final judgment granting review by this Court pursuant to 28 U.S.C.A. § 1257(a) (West 1993). See, *O'Dell v. Espinoza*, 456 U.S. 430 (1982).

The four bases generally used as a basis for taking jurisdiction prior to final judgment are set forth in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 467 (1975). First, the remand requires an affirmative finding by the trial court if the Ordinance is to be found constitutional. Second, there is no proof of immediate hardship of an irreparable nature to Gray or RWS by requiring the Petitioners to present their proof for an exemption. Third, the findings by the trial court may eliminate any constitutional questions. Fourth, there are no unique questions of federal policy presented by this Petition because the critical

issues in this case are now being considered by this Court in *Town of Clarkstown v. C&A Carbone, Inc.*, 587 N.Y.S.2d 681 (1992), cert. granted, 126 L.Ed.2d 369, 62 U.S.L.W. 3334.

Further proceedings are necessary to determine the existence of a federal question and to frame the issue. See, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); Wright, Miller, Cooper & Greshman, *Federal Practice & Procedure, Civil* § 4009 at 589-590 (2 Ed. 1990 and Supp. 1993). This case is not ready for review by this Court.

2. The Ordinance Is Discriminatory On Its Face And Is Subject To Review In The Trial Court By A "Strict Scrutiny" Standard.

The trial court made a finding that the Ordinance has an effect on interstate commerce (Pet. 38a). The trial court stated, " . . . yes, it restricts the free flow of commerce, taking the view, as you have, correctly, that waste is a commodity." See, Pet. 38a. The Maine Supreme Court agreed that waste is a commodity, citing *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019, 2033 (1992). Specifically, the Maine Supreme Court found that:

> The aggregate effect of ordinances similar to Gray's could have a substantial impact on interstate commerce. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 537 (1985); *Hodel v. Virginia Surface Mining and Reclamation Ass'n. Inc.*, 452 U.S. 264, 277 (1981).
>
> (Pet. 4a)

The statement by Petitioners is disingenuous. The findings by the trial court completely describe the nature of the intrusion upon interstate commerce and concede that the Ordinance is facially discriminatory. The Maine Supreme Court, therefore, affirmed the findings of fact by the trial court.

At page 23 of their Petition, Gray and RWS charge that the Maine Supreme Court "did not discuss how such discrimination manifests itself . . . "

The concept that even-handed regulation of intra-municipal activities is irrelevant. The Petitioners fail to recognize the intra-municipal and interstate impact of the Ordinance. Preclusion of waste from interstate and, indeed, from intra-municipal commerce, injures others who have need of the commodity to fuel other waste to energy plants as well as for recycling and other more desirable forms of waste disposal identified by the Maine Legislature at 38 M.R.S.A. § 2101 (West Supp. 1993).

The argument that intra-municipality even-handedness does not violate the dormant Commerce Clause is the same position advanced by the Town of Clarkstown, see, pp. 14-15 of the Town of Clarkstown's Reply to the Petition of C. A. Carbone, Inc. This argument was put to rest in *Fort Gratiot*, supra, 112 S.Ct. at 2023. Entire industries are dependent on the supply of waste. Hoarding necessarily restricts the flow of waste to others requiring waste for raw material in their business activities.

3. Petitioners Did Not Raise The Issue Of Federal Delegation In The Maine Courts.

The Petitioners contend that RCRA § 6901(a)(4) (West 1983) constitutes an express reservation to the state and local governments of the authority to restrict interstate trade in connection with the disposal of solid waste. This issue was not raised by the Petitioners either in the trial court or on appeal to the Maine Supreme Court. This issue was not specially set up or claimed in the State courts as required by 28 U.S.C.A. § 1257 (West 1993). There is an inadequate record in the State courts to fully present the issue regarding federal delegation of powers. The standards outlined by this Court in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985) have not been met.

A trial on the merits of federal pre-emption would necessarily involve an examination of the congressional intent to displace interstate commerce to meet objectives that can readily be achieved by less obtrusive means. Evidence can show that other activities to avoid landfilling are more consistent with the objectives of the RCRA. For example, the residual ash from incineration is equal to about 30% of the original weight. This ash is often toxic. The ash is dumped in a landfill. Also, the process of incineration creates air pollution sought to be limited by other federal and state laws.

If the issue of the pre-emption of the dormant Commerce Clause had been raised in the State courts, there would have been extensive dialogue regarding conflicting policy goals.

Therefore, the Petitioner's federal pre-emption argument cannot be raised for the first time in this request for Certiorari.

It has been the position of this Court that a *de novo* review will not be entertained on appeal from the state courts. See, *Cadinale v. State of Louisiana*, 394 U.S. 437, 439 (1969). It is the burden of the Petitioners to show that this particular issue has been preserved for consideration by this Court, and the Petitioners have made no effort to comply with this requirement.

4. RCRA Does Not Restrict The Application Of The Dormant Commerce Clause To Validate Hoarding Of Commodities.

Without any precedential authority, the Petitioners claim that RCRA "implicitly" grants municipalities the authority to control waste because RCRA describes waste disposal as a purely local authority. The Petitioners then say that waste disposal is impossible without flow control. The Petitioners equate the ability to enter into disposal contracts with a congressional exemption from the dormant Commerce Clause.

The argument that waste facilities could not be financed without an assurance of a steady supply of waste was advanced in *DeVito v. Rhode Island Solid Waste Management Corporation*, 770 F.Supp. 775, 784 (D.R.I. 1991). The District Court rejected this theory indicating that lenders should be satisfied with a pledge of the full faith and credit of the municipalities.

No argument is advanced here, nor was it advanced in the Maine courts, tying the primary duty to dispose of waste to an exemption from constitutional limitations. Nothing in the RCRA leads to the conclusion that Congress intended to suppress free trade in waste and to encourage balkanization of waste disposal. Without specific authorization, the Commerce Clause must prevail. See, *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1913 (1992).

CONCLUSION

The Maine Supreme Court correctly decided the issues in this case, and those issues are now under consideration by this Court in *Clarkstown*. There is no reason to grant Certiorari in this case, and even if there were, the request for certiorari is premature.

Respectfully submitted, this 11th day of February, 1994.

RALPH A. DYER, ESQ.
LAW OFFICES OF RALPH A. DYER, P.A.
477 Congress Street, Suite 702
Portland, Maine 04101
(207) 773-6489

Attorney for Respondents